HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE C.V.NAGARNUNA REDDY

WRIT APPEAL No.54 OF 2007

Between:

National Highways Authority of India,
Ministry of Shipping, Road Transport & Highways,
New Delhi.
Rep by General Manager.

... Appellant

AND

M/s.KMC Constructions Limited,
MCH No.555, Arora Colony, Road No.3,
Banjara Hills, Hyderabad.

And another.

... Respondents

Counsel for the Appellant : Sri E.Manohar, Senior Counsel
Assisted by Smt.Tara Sharma.

Counsel for Respondents : Sri K.Ram Murthy, Senior Counsel
Assisted by Ms. Uma Devi.

: JUDGMENT:

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Per C.V.Nagarjuna Reddy, J

The order dated 29.11.2006 of the learned single Judge in W.P.No.18269 of 2006 is the subject matter of this writ appeal.

Respondent No.1 to the writ petition is the appellant in this writ appeal.

Shorn of unnecessary details, the facts in brief are narrated hereunder:

In response to the tenders invited for the work of widening of four lanes and strengthening of existing two lane carriage ways between K.M.278/000 to K.M.240/000 of Udaypur-Ratanpur-Gandhinagar section of N.H.8, respondent No.1 submitted its bid on 18.6.2001. The appellant issued letter of acceptance dated 22.8.2001 for a value of Rs.164.75 crores. As per the terms and conditions, the first respondent furnished bank guarantee for a sum of Rs.16,47,57,636/- towards due performance of contract. It is stipulated in the bank guarantee that the same shall be valid only for 28 days after the date of issue of Defect Liability Certificate (DLC) (i.e., 12.6.2005 as per the original schedule). On 5.10.2001 an agreement was entered into between the parties whereunder 30.4.2004 was stipulated as the scheduled date of completion. Exercising the option of substituting the retention money with unconditional bank guarantee, the first respondent furnished bank

guarantee for Rs.4.12 crores on 16.12.2003, having received the retention money. The work was completed on 26.2.2004 as against the schedule date of completion on 30.4.2004.

In terms of clause 48.1 of the contract, the first respondent issued a notice to the Engineer to issue a taking over certificate in respect of the works. On 20.3.2004 the Engineer issued taking over certificate while certifying that the work is completed. It is however mentioned therein that the chainage-wise list of the defects which are required to be rectified immediately is being sent separately.

As required under clause 60.10 the first respondent sent the statement of completion well before the expiry of the stipulated time, on 8.5.2004 whereunder details of the work done and value there of were mentioned and it has claimed a sum of Rs.70,51,84,650/- from the appellant. The Engineer vide his letter dated 17.5.2004 raised certain objections to the statement of completion on various aspects including some of the claims raised by the first respondent, quantities relating to earth work, rechecking of original ground levels etc., and returned the same for preparation of the statement afresh keeping in view the said objections and for resubmission. On 30.5.2004 respondent No.1 resubmitted the statement of completion. On 16.2.2005 the Engineer forwarded a certificate to the employer wherein it was certified that a sum of Rs.24,698/- is due to the first respondent for payment. There was no response from the appellant to this letter. The first respondent was called upon by the appellant to extend the validity of the bank guarantee dated 30.9.2001 which was due to expire on 12.6.2005, in view of extension of defect liability period up to 31.5.2005. The case of respondent of course is that the defect liability period expired on 28.2.2005 and that the Engineer never informed respondent No.1 that the defect liability period was extended up to 31.5.2005. There was

exchange of correspondence on the extension of bank guarantee, the details of which need not be mentioned here as it is not relevant for the present purpose. Suffice it to state that on 10.2.2006 respondent No.1 extended the validity of the bank guarantee up to 28.5.2006. A few days earlier, i.e., on 6.2.2006 the Engineer in his letter addressed to the appellant stated that total recoveries under refundable and non-refundable heads came to Rs.8,81,70,571/- and that a sum of Rs.2,98,43,202/- which was withheld under refundable head may be released to the first respondent. On 30.3.2006 the appellant wrote to the first respondent to extend the bank guarantee up to 31.7.2006 and in response thereto the first respondent through his letter dated 12.4.2006 stated that the defect liability period expired on 28.2.2006 and that therefore, the bank guarantees have to be released. On 24.5.2006, the Engineer issued the DLC and it is apt to extract the same herein below:

> " This is to certify that as on 24th May 2006, all works have been satisfactorily accepted subject to certain defects and recovery of Rs.42,63,034/- (Rupees forty two lakhs sixty three thousand and thirty four only) therefore, as listed in Appendix to this certificate. The contractor has fulfilled all of its physical and contractual obligations under the above said contract.
>
> This Defect Liability Certificate is issued in accordance with sub-clause 62.1 of the General Conditions of Contract."

On 26.5.2006 the first respondent requested the Engineer to release the bank guarantee for Rs.6.12 crores furnished against retention money and authorizing the appellant to make recoveries from any of the bank guarantees furnished against performance security. The Engineer vide his letter dated 29.7.2006 addressed to the appellant stated that the first respondent is liable to pay a sum of Rs.18,16,34,122/- towards both refundable and non-refundable

recoveries. The appellant through its letter dated 28.4.2006 addressed to the second respondent (Andhra Bank, Hyderabad) invoked the bank guarantee and requested the bank to remit Rs.16,47,57,636/-. On 25.8.2006 the first respondent wrote to the Chief General Manger of the second respondent not to enforce the bank guarantee. The first respondent along with his letter dated 25.8.2006 while informing the appellant that the validity of the bank guarantee was extended upto 28.2.2007, sent a copy of the extension of the bank guarantee to the Project Director of the appellant while sending the original bank guarantee to the Chief General Manager of National Highways Authority of India, New Delhi. The second respondent also wrote to the appellant about the extension of bank guarantee up to 28.2.2007. The first respondent in its letter dated 25.8.2006 informed the appellant that it will extend the bank guarantee till the completion of arbitration and that if the first respondent is found liable to pay any amount in the arbitrator's award, it will pay the amounts with interest. It was also informed that the first respondent is going for arbitration on the Engineer's decision and the appellant was requested not to take drastic action of encashment of bank guarantee. The appellant addressed a letter dated 28.2.2006 to the second respondent wherein the latter was requested to inform whether the first respondent extended the bank guarantee for a period of six months up to 28.2.2007 and that if such an extension was made the second respondent may treat the notice dated 24.8.2006 as withdrawn. The first respondent in their letter dated 26.8.2006 addressed to the appellant disputed the proposed recoveries. In response to the letter dated 30.8.2006 of the appellant calling upon the first respondent to deposit a sum of Rs.6.47 crores, the first respondent sent the demand draft for Rs.42,63,034/- on 31.8.2006 stating that the said amount was

due as per the DLC dated 24.5.2006.

The first respondent at that stage filed WP.No.18269 of 2006 in this court. On 1.9.2006 the learned Single Judge granted interim injunction against invocation of bank guarantee. On 4.9.2006 the appellant called upon the first respondent to deposit a sum of Rs.16,47,57,636/- and in response thereto the first respondent informed the appellant about the interim order granted by this Court. The appellant then moved this Court for vacating the interim order and after hearing both the parties this Court disposed of the writ petition on 29.11.2006.

The learned single Judge while holding that this Court has territorial jurisdiction to entertain the writ petition and decide the same, also held that the writ petition involving dispute relating to contract is also maintainable. The learned Judge further held that clauses 67.1 to 67.4 of general conditions of contract which provide for settlement of disputes by way of arbitration do not operate as a bar for entertaining the writ petition and adjudicating the dispute by this Court on the premise that the bank guarantee dated 13.9.2001 constitutes a separate contract which does not contain an arbitration clause or provide for any other remedy for settlement of disputes. The learned Judge therefore entered into the merits of the dispute relating to the justification or otherwise for invoking the bank guarantee and held that since the first respondent's obligation under contract were fulfilled and the purpose for which the performance security was furnished was served, the appellants cannot encash the bank guarantee on any other ground including the alleged liability quantified in the revised statement at completion dated 29.7.2006. The learned single judge having taken note of the first respondent invoking the arbitration clause in their letter dated 16.9.2006 to adjudicate its claim for

Rs.70,51,81,650/- and the counter claim of the appellant for Rs.18,16,34,122/- held that since those claims are subject matter of arbitration proceedings and are yet to be adjudicated, the appellant is not entitled to take any coercive steps against the first respondent including invocation of bank guarantee for the amounts recoverable from the first respondent.

When the writ appeal came up before this Court on 6.2.2007, while posting the case for final arguments we directed the appellant not to encash the bank guarantee furnished by respondent No.1 subject to the condition that within a period of 15 days respondent No.1 shall extend the validity of the bank guarantee till 30.4.2007. The arguments were finally heard on 23.3.2007.

Sri E.Manohar, learned Senior counsel assisted by Smt.Tara Sharma argued for the appellant while Sri K.Rama Murthy, learned senior counsel assisted by Miss.V.Uma Devi argued for the first respondent.

The main contention advanced by Sri E.Manohar, learned senior counsel for the appellant is that the first respondent having invoked arbitration clause even before filing writ petition before this Court was not entitled to invoke the jurisdiction of this Court. He further submitted that since the subject mater of the dispute raised in the writ petition is also the subject matter of arbitration proceedings which were already commenced with the arbitrators entering on reference, the learned single Judge ought not to have interfered in the matter and interdicted the appellant from encashing the bank guarantee. The learned senior counsel drew our attention to the letter dated 25.8.2006 wherein the first respondent specifically invoked clause 67.3 of Section-III of Conditions of Particular Application of Agreements for reference of disputes for arbitration and submitted that when the subject matter of

dispute in the writ petition was already a subject matter of arbitration proceedings, there was no justification for the learned Judge to adjudicate the dispute relating to the encashment of bank guarantee.

Sri K.Rama Murthy, learned senior counsel for respondent No.1 contended that the whole action of the appellant is wholly arbitrary. He further submitted that while the claims and counter claims arising under the contract are the subject matters of dispute before the arbitrators, there is no bar on the first respondent to maintain the writ petition in this Court wherein the action of the appellant in unjustly and arbitrarily seeking to encash the bank guarantee even after the issue of DLC is called in question. He also sought to support the finding of the learned single Judge that since the bank guarantee constitutes a separate contract, there is no remedy of arbitration or any other remedy available to the first respondent and that therefore, the writ petition is maintainable. Sri Rama Murthy cited judgment of the Supreme Court in **ABL International Ltd., and Another vs Export Credit Guarantee Corporation of India and Others**[1] in support of his contention that the writ petition is maintainable.

After hearing the rival contentions, the questions that arise for consideration in this writ appeal are whether it was open to the first respondent to have invoked the jurisdiction of this Court by filing the writ petition having invoked the arbitration proceedings and whether the learned single Judge was justified in granting the relief of restraining the appellant from invoking the bank guarantee till completion of arbitration proceedings?

Indeed the issue whether the disputes arising under a commercial contract are amenable to writ jurisdiction is a subject matter of a long debate. In **M/s.Radhakrishna Agarwal and Others**

vs State of Bihar and Others[2] the Supreme Court made a distinction between a dispute arising at the very threshold or at the time of entry into the contract and a dispute arising after entering into contract and held that while in the former case judicial review is permissible and in the latter case the judicial review is not permissible on the ground that even though the State or its agents enter into the field of ordinary contract, they are not governed by the constitutional provisions, unless such contracts are statutory in nature. A similar view was taken by the Supreme Court in **Premji Bhai Parmar vs Delhi Development Authority**[3], **D.F.O. vs Biswanath Tea Company Ltd.,**[4] **Bareilly Development Authority and Another vs Ajay Pal Singh and Others**[5] and **State of U.P. and Others vs Bridge and Roof Company (India) Ltd.,**[6]**.** However a different note was struck by the Supreme Court in **M/s.Dwarakadas Marfatia and Sons vs Board of Trustees of the Port of Bombay**[7]**.** In that case the Supreme Court while rejecting the argument that in respect of a dispute arising out of a tenancy between Bombay Port Trust and the tenant, judicial review under Article 226 of the Constitution was not available for the tenant, held that the actions of the State are amenable to judicial review only to the extent that the State must act validly for a discernible reason not wholly for any whimsically or for any ulterior purpose and that every action/activity of the Bombay Port Trust which constitutes 'State' within Article 12 of the Constitution of India in spite of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable. It was further held that where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down; that whatever be the activity of the public

authority it should meet the test of Article 14.

In **Mahabir Auto Stores and Others vs Indian Oil Corporation and Others**[8] the Supreme Court held that every action of the State government authority must be subject to rule of law and must be informed by reason and whatever be the activity of the public authority it should meet the test of Article 14 of the Constitution of India. However the Supreme Court cautioned by saying that Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into and existence of power of judicial review however depends upon the nature of and the rights involved in the facts and circumstances of the particular case.

In **ABL International Ltd., case (1 supra)** the Supreme Court held in para-23 as under:

> " It is clear from the above observations of this Court once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly , justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent."

In para-27 the Supreme Court summarized the legal principles as under:

> " (a) In a proper case the writ petition as against the state or an instrumentality of a state arising out of a contractual obligation is maintainable.
>
> (b) Merely because some disputed questions of fact arise for consideration, the same cannot be a ground to refuse to entertain a writ petition in all cases as matter of rule.

© Writ petition involving a consequential relief of monetary claim is also maintainable."

In view of the law as crystallized in the last mentioned judgment the writ petition filed by the first respondent is maintainable and the learned Judge justifiably entertained the same. However, Sri E.Manohar, learned counsel pointed out that in **ABL International Ltd., case (1 supra)** it was held that where the parties agreed for arbitration, the writ petition under article 226 of the Constitution is not maintainable. Sri Rama Murthy, learned counsel contended that as held by the learned Single Judge that since bank guarantee constitutes a separate contract and the said instrument did not contain an arbitration clause there is no bar to invoke the jurisdiction of this Court. We have carefully gone through the contents of the bank guarantee issued by the second respondent bank on 13.9.2001. The relevant portion of the bank guarantee reads as under:

" Whereas M/s.KMC Constructions Limited, MCH No.555, Arora Colony, Road No.3, Banjara Hills, Hyderabad – 500034 (hereinafter called " the contractor") has undertaken, in pursuance of contract No. dated to execute "widening to 4-lanes and Strengthening of the existing 2-lane carriageway of Udaipur-Ratanpur-Gandhinagar section of National Highway No.8 UG-I from Km 278.000 to Km 340.000 in the state of Rajasthan" (hereinafter called "the contract").

And whereas it has been stipulated by you in the said contract that the contractor shall furnish you with a Bank Guarantee by a recognized bank for the sum specified therein as security for compliance with his obligations in accordance with the contract."

A reading of the aforementioned clauses clearly shows that the first respondent furnished the bank guarantee in pursuance of the contract for execution of the work in dispute as a security for performing the obligations arising under the said contract. Thus the

main contract for execution of the work between the parties is incorporated by a reference in the deed of bank guarantee. Further it is relevant to consider clauses 67.1 and 67.3, which for the sake of convenience are extracted herein below:

" Sub-Clause **67.1:**

First para of this sub-clause shall read as under:

That if a dispute arise between the employer and the contractor in connection with or arising out of the works, whether during the execution of the works or after their completion and whether before or after repudiation or other termination of the contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuance to this clause. No later than eighty fourth day on which he received such reference, the Engineer shall given notice of this decision to the employer and the contractor and such decision shall state that it is pursuant to this clause."

Sub-Clause 67.3: Arbitration

" This sub-clause shall read as below:

Any dispute in respect of which the decision, if any, of the Engineer has not become final and binding pursuant to sub-clause 67.1, shall be finally settled as set forth below:

i) The dispute with the contractor, whether Indian or foreigner, shall be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act 1996, or any statutory amendment thereof. The arbitration tribunal shall consist of three arbitrators, one each to be appointed by the Employer and the Contractor, the third arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as presiding Arbitrator. In case of failure of the two arbitrators appointed by the parties, to reach upon a consensus within a period of 28 days from the

appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the President, Indian Road Congress. For the purpose of this sub-clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juristic person created under Indian Law as well as a joint venture between such a contractor and a foreign contractor.

ii) Neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments already put before the Engineer, for the purpose of obtaining his said decision. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the Arbitrators or any matter whatsoever relevant to the dispute.

iii) The reference to arbitration may proceed notwithstanding that the works shall not then be or be alleged to be complete, provided always that the obligations of the employer, the Engineer and the Contractor shall not be altered by the reason of the arbitration being conducted during the progress of the works. Neither party shall be entitled to suspend the works, and payment to the contractor shall be continued to be made as provided by the contract.

iv) If one of the parties fails to appoint its arbitrator in pursuanc3e of sub-para (i) above, within 60 days after receipt of the notice of the appointment of its arbitrator by the other party, the President, Indian Road Congress shall appoint the arbitrator. A certified copy of the President, Indian Road Congress's order, as the case may be making such an appointment shall be furnished to both the parties.

v) Arbitration proceedings shall be held at New Delhi, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

vi) The decision of the majority of arbitrators shall be final and binding upon both parties. The fees and expenses of the arbitrators and expenses of the arbitration proceedings as determined by the arbitrators shall be shared equally by the Employer and the Contractor. However, the expenses incurred

by each party in connection withy the preparation, presentation, etc., of its case prior to, during and after the arbitration proceedings shall be borne by each party itself.

vii) All arbitration awards shall be in writing and shall state the reasons for the award."

From the afore extracted clauses it is clear that they are of widest amplitude taking into their fold disputes of any kind whatsoever arising between the employer and the contractor in connection with or arising out of the contract or the execution of the works, whether during the execution of work or after their completion and whether before or after repudiation or on the termination of contract. As already discussed hereinabove the bank guarantee in question was given towards due performance of the contract and therefore a dispute relating to its invocation is certainly a dispute which arises in connection with the main contract and in our opinion such a dispute certainly falls within the scope of clauses 67.1, 67.2 and 67.3 of the general conditions of contract. The terms of the bank guarantee cannot be read in isolation since the bank guarantee has come into existence as a sequel to main contract entered into between the appellant and the first respondent and therefore the dispute pertaining to the invocation of bank guarantee under the said contract cannot be treated as a dispute unconnected with or unrelated to the main contract. We therefore do not agree with the order of the learned Single Judge to the extent it is held that the bank guarantee furnished by the second respondent bank constitutes a separate and distinct contract, independent from the main contract and that therefore, the remedy of arbitration as contained in clause 67.1 to 67.4 is not available to the first respondent.

But the question which still remains is whether this Court cannot entertain the writ petition merely because an arbitration dispute is

already raised and pending adjudication?

From the case law discussed above it is clear that in an appropriate case a writ petition against the State or its instrumentalities arising out of a contractual obligation is maintainable and it is open to this Court while exercising writ jurisdiction to test the action of the State or its instrumentality on the touch stone of Article 14 of the Constitution of India. With reference to the observations contained in paragraphs 13 and 14 of the Judgment of the Supreme Court in **ABL International Ltd., case (1 supra)** on which reliance is placed by Sri E.Manohar in support of his contention that writ ought not to have been entertained in view of the availability of the remedy of arbitration, we have carefully considered the said submission in the light of the judgment of the Supreme Court. The Supreme Court in the said case while considering the observations contained in **State of U.P. and Others vs Bridge and Roof Company (India) Ltd., case (6 supra)** observed in para-14 that where the parties to a dispute had agreed to settle the dispute by arbitration under an agreement, the courts will not permit them to have recourse to any other remedy without exhausting the said remedy of arbitration. However, after summarizing the legal principles as to the maintainability of the writ petition in para-27, the court in para-28 held as under:

> " However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. V. Registrar of Trade Marks (1998) 8 SCC 1)*. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to

> the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks fit necessary to exercise the said jurisdiction."

From a combined reading of paragraphs 13, 14 and 28 in the **ABL International Ltd., case (1 supra),** it is clear that the Supreme Court has recognized the existence of plenary right of the High Court even in cases of availability of other remedies in appropriate cases where the High Court is satisfied that the action of the state or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 of for other legitimate reasons for which the Court thinks it is necessary to exercise the said jurisdiction.

In the present case, the dispute which is raised in the writ petition by the 1st respondent is only confined to the issue relating to the invocation of the bank guarantee by the appellant. The appellant sought to invoke the bank guarantee as the first respondent has not paid a sum of Rs.18,16,37,122/- towards refundable and non-refundable recoveries. Whether in law and on facts these amounts are payable by the first respondent or not is indeed the subject matter of the arbitration as far as the counter claims of the appellant are concerned. Therefore, the limited question that actually arises in the present dispute before this Court is whether pending adjudication of the counter claims by the arbitrators the appellant is justified in invoking the bank guarantee for non-payment of those amounts. We are of the considered opinion that for the limited purpose of considering this issue the writ petition was very much maintainable despite reference of the claims and counter claims of the parties for arbitration. In that view of the matter **ABL International Ltd., case**

(1supra), understood from proper perspective does not bar the maintainability of the writ petition in appropriate cases where the action of the State or its instrumentality is questioned as arbitrary.

On a careful consideration of the entire facts of the case it clearly appears to us that the appellant has been showing undue anxiety in seeking to encash the bank guarantee even before the liability of the first respondent is properly settled. One fails to understand how a sum of Rs.42,63,034/- as determined by the Engineer as the liability of the first respondent towards the value of recovery and defects has shot up to Rs.18.16 crores in about less than five weeks time. It is not the case of the appellant that the first respondent was given any notice and an opportunity to explain his case before making steep revision in the assessment of the first respondent's liability. Whether these amounts are payable by first respondent or not is the subject matter of dispute for arbitration and we refrain from giving any opinion on the same. But when there is a bona fide dispute relating to the liability of the first respondent, in our considered opinion there is no justification at all for the appellant to encash the bank guarantee which was given by the first respondent towards due performance of the contract. With the issue of DLC following the completion certificate it cannot be said that the 1st respondent failed to perform the contract as per the agreement. Even assuming that certain amounts are due towards value of defects and recoveries, on determination of such liability it is always open to the appellant to recover the same from the first respondent. But pending adjudication of the dispute and when the first respondent has extended the validity of bank guarantee up to 28.2.2007, the appellant was not at all justified in persisting with the invocation of the bank guarantee and this action is wholly arbitrary. On this aspect we are in entire agreement with the view of the learned Single Judge and we do

not see any error in the judgment of the learned Single Judge warranting interference by us in exercise of our Letters Patent jurisdiction.

Sri E.Manohar submitted that the Engineer vide his letter dated 29.7.2006 determined the liability of the first respondent at Rs.18,16,34,122/- and therefore the first respondent is bound to pay the said amount which will be subject to the result of the arbitration proceedings. He also invited our attention to the letter dated 25.8.2006 addressed by the first respondent wherein the first respondent is said to have undertaken to pay the amount due to the appellant within 15 days by way of demand draft. Undoubtedly the first respondent stated in his letter as under:

> " With reference to the Bank Guarantee encashment, we would like to inform the National Highways Authority of India of our concern if the following action is taken forward which will result in our company not only loosing the credibility that we have built up for the past 30 years but also will put in doubt of our remaining projects being undertaken by us for NHAI.
>
> In order to save our name and credibility, we would like to inform NHAI of our obligation to fulfill whatever the amount due to NHAI within 15 days by way of demand draft.
>
> We again humbly request you to grant our with and not to enforce your claim of BG encashment and also pray to withdraw the instructions given to the Bank."

But this letter cannot be read in isolation. We have to consider the sequence in which this letter was written. From the narration of events which was given in the foregoing it is clear that prior to the issue of DLC the Engineer on 6.2.2006 determined the liability of the first respondent as 8,81,70,571/-. However on 24.5.2006 a DLC was given wherein the first respondent's liability to certain defects and recovery was reduced to Rs.42,63,034/-. After the issue of DLC the

Engineer has revised this figure to Rs.18,16,34,122/-. The first respondent since then had been seriously disputing this assessment made by the Engineer and the appellant was persistently threatening to invoke the bank guarantee towards recovery of these disputed amounts. In this backdrop the statement contained in the letter dated 25.8.2006 is required to be considered. Immediately on the next day, i.e., on 26.8.2006 the first respondent addressed a letter which reads as under:

> " We have been orally informed by Andhra Bank, Sultanbazar Branch, Hyderabad that National highways Authority of India (employer) have asked the bank for encashment of our Bank Guarantee amounting to Rs.16,47,57,636/-.
>
> We have not been informed the details of how this amount has been arrived at and the reasons and decisions of the Employer and the Engineer have not been communicated to us.
>
> We hereby lodge our protest for the encashment of Bank Guarantee and for not informing us any reasons and details of amounts as worked out by you. Therefore we shall be free to dispute as soon as you furnish us the details of item wise recoveries made by you.
>
> We request you to furnish us at least the details of recoveries proposed including the item wise rates as revised and approved by you to enable us to take further necessary action in terms of agreement conditions."

The letter dated 25.8.2006 therefore cannot be construed either as the admission of respondent No.1 of its liability to pay the demanded amount or the same as constituting waiver on its part.

In the result the writ appeal fails and is accordingly dismissed. We however direct that till the completion of the arbitration proceedings the first respondent shall renew the bank guarantee and keep it alive.

C.V.NAGARJUNA REDDY,J

Date:

G.S.SINGHVI, CJ

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[1] (2004) 3 SCC 553

[2] AIR 1977 SC 1496

[3] AIR 1980 SC 738

[4] AIR 1981 SC 1368

[5] AIR 1989 SC 1076

[6] (1996) 6 SCC 22

[7] AIR 1989 SC 1642

[8] AIR 1990 SC 1031